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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA - SOUTHERN DIVISION  
HONORABLE CORMAC J. CARNEY, U.S. DISTRICT JUDGE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	<b><u>CERTIFIED TRANSCRIPT</u></b>
	)	
vs.	)	
	)	Case No.
JOSEPH MARTIN GOVEY,	)	8:17-cr-00103-CJC-1
	)	
Defendant.	)	
	)	

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REPORTER'S TRANSCRIPT OF  
PRETRIAL CONFERENCE  
THURSDAY, DECEMBER 21, 2017  
9:05 A.M.  
SANTA ANA, CALIFORNIA

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**DEBBIE HINO-SPAAN, CSR 7953, CRR**  
FEDERAL OFFICIAL COURT REPORTER  
411 WEST FOURTH STREET, ROOM 1-191  
SANTA ANA, CALIFORNIA 92701-4516  
dhinospaan@yahoo.com

**APPEARANCES OF COUNSEL:**

**FOR THE PLAINTIFF:**

NICOLA T. HANNA  
United States Attorney  
BY: BRADLEY MARRETT  
Assistant United States Attorney  
United States Courthouse  
General Crimes Section  
411 West Fourth Street  
Suite 8000  
Santa Ana, California 92701  
(714) 338-3505

**FOR THE DEFENDANT:**

SCOTT TRIAL LAWYERS APC  
BY: TIMOTHY A. SCOTT, ESQ.  
1350 Columbia Street  
Suite 600  
San Diego, California 92101  
(619) 794-0451

1                   **SANTA ANA, CALIFORNIA; THURSDAY, DECEMBER 21, 2017**

2                   **9:05 A.M.**

3                   - - -

4                   THE COURTROOM DEPUTY:   Calling Item No. 2,  
09:05AM 5           SACR17-103, United States of America versus Joseph Martin  
6           Govey.

7                   Counsel, please state your appearances.

8                   MR. MARRETT:   Good morning, Your Honor.   Brad  
9           Marrett for the United States.

09:05AM 10           THE COURT:   Hello, Mr. Marrett.

11                   MR. SCOTT:   Good morning, Your Honor.   Tim Scott for  
12           Mr. Govey.   He's present before the Court in custody.

13                   THE COURT:   Hello, Mr. Govey.   Hello, Mr. Scott.

14                   Well, we have quite a number of things we need to do  
09:05AM 15           today.   What I wanted to do first was address the motions.   And  
16           there's one of the motions I have a concern about, and I wanted  
17           to get everybody's thoughts to see how we resolve it, if it can  
18           be resolved.   And that motion deals with -- I mean, that issue  
19           deals with the motion to exclude the Orange County Sheriff's  
09:06AM 20           Department inmate-informant scandal.

21                   Let me tell you what my tentative is on this motion, and  
22           then I will tell you the issue that I'm having.   My inclination  
23           is to deny the motion because the Orange County Sheriff's  
24           Department jail informant scandal is relevant to proving  
09:06AM 25           Deputy Larson's motive, bias, and character for truthfulness or

1 untruthfulness.

2 I'm aware that Deputy Larson is a key witness in that  
3 scandal, and in the subsequent criminal case asserted his Fifth  
4 Amendment right and refused to testify regarding his  
09:07AM 5 involvement in the scandal and the truthfulness of his  
6 testimony in an earlier criminal case where Judge Goethals  
7 found intentional misconduct on the deputy's part.

8 In a subsequent case before Judge King, the defendant, I  
9 believe, was Eric Ortiz, I believe it was murder charges, the  
09:07AM 10 DA had to dismiss the charges because Deputy Larson asserted  
11 his Fifth Amendment rights. So as I understand it in this  
12 case, Deputy Larson is one of the two deputies that did the  
13 search, so he is a percipient witness whether the government  
14 calls him, which I understand they intend to, or the defense  
09:07AM 15 calls him.

16 My issue, is he going to assert his Fifth Amendment  
17 rights? Because it is totally appropriate for Mr. Scott to  
18 cross-examine him about whether he was truthful or not truthful  
19 with that. And if he's going to assert his Fifth Amendment  
09:08AM 20 rights, we got a problem.

21 MR. MARRETT: So I guess to address first, Your  
22 Honor, the -- I just want to clarify what the Court's concerns  
23 are. Your understanding is that there was two cases where  
24 Deputy Larson asserted his Fifth Amendment rights?

09:08AM 25 THE COURT: No, I'm aware of one case. He -- are

1 you familiar with the *Dekraai* case, I assume?

2 MR. MARRETT: Generally familiar with it, yes, Your  
3 Honor.

4 THE COURT: The *Dekraai* case was before  
09:08AM 5 Judge Goethals, and the public defender in that case from the  
6 get-go had believed that there was this unconstitutional  
7 informant program that the deputies were running with the  
8 knowledge of the gang unit DAs.

9 And Mr. Scott, if you have more to add on anything, you're  
09:09AM 10 not going to offend me if you correct me. In fact, I want you  
11 to correct me if you have more or different information. But  
12 my understanding is the public defender smelled a rat that what  
13 the deputies were doing was there would be defendants that are  
14 represented by counsel, and the deputies would be moving  
09:09AM 15 informants to be their cellmate and try to get the defendants  
16 to confess. And that is, according to the United States  
17 Supreme Court and California Supreme Court, unconstitutional,  
18 violates *Massiah*, because the informants are an agent of the  
19 government, and the defendant is represented by counsel.

09:10AM 20 My understanding, there were four deputies that were  
21 involved, and the four were: Deputy Tunstall, Deputy Garcia,  
22 Deputy Larson and Deputy Grover. And Judge Goethals had a  
23 hearing -- evidentiary hearing that went on for quite a while.  
24 And he concluded at that point that there was negligence,  
09:11AM 25 serious negligence by the deputies, but no intentional

1 misconduct after listening to these deputies' testimony.

2 Then as I understand it chronologically, Judge Selna had  
3 what we call the Mexican Mafia case. And some way, somehow  
4 it's not clear to me that two or more of these deputies, not  
09:11AM 5 Deputy Larson, could be witnesses in his case. And based on  
6 Judge Goethals' finding that it was just negligence, he  
7 concluded it wasn't relevant.

8 Okay. Next thing that happened is public defender finds  
9 out that the testimony of these deputies and what was before  
09:11AM 10 Judge Goethals was false and it wasn't true. He persuades -- I  
11 don't know how many times it took him, but he persuades  
12 Judge Goethals to reopen the proceedings. Judge Goethals  
13 reopens the proceedings. You have these guys testify. I  
14 believe the sheriff herself had to testify. Other people  
09:12AM 15 testified.

16 To make a long story short, Judge Goethals makes  
17 credibility findings about the witnesses and believes that  
18 they've been dishonest -- willfully dishonest and withholding  
19 and destroying documents and feels that the DAs are responsible  
09:12AM 20 because they can't control the deputies and then boots off the  
21 DA from prosecuting the death penalty.

22 My understanding, Dekraai had pled guilty to the murders,  
23 but he was just challenging the death penalty. Judge Goethals  
24 removed the DA's office from the case based on his findings,  
09:13AM 25 based on the testimony of these deputies. That was appealed.

1 And the Court of Appeal, I think it was Justice O'Leary wrote  
2 the opinion, it was pretty stinging about the integrity,  
3 honesty of the Sheriff's Department and this informant program  
4 called an informant scandal.

09:13AM 5 That's not the end of the story. My understanding is  
6 there were several cases -- I want to say five, but I -- please  
7 don't hold me to that number, but I know at least one case  
8 where there were two deputies, if not three, but two deputies  
9 that were involved and in uniform on the stand, they asserted  
09:14AM 10 their Fifth Amendment rights and would not answer questions  
11 about their testimony before Judge Goethals or anything about  
12 this informant program. And one of those deputies was  
13 Deputy Larson.

14 And again, the case that he did that is Eric Ortiz,  
09:14AM 15 11CF0862, and he asserted his Fifth Amendment rights, I  
16 understand, on October 8, 2015. I don't know whether this is  
17 hearsay or just in some of the communities one of the -- or  
18 raised in the press, one of the issues the press has criticized  
19 the sheriff for is why are you -- why this cloud of controversy  
09:15AM 20 is going on? And as I understand, the feds are investigating  
21 the DA, the informant program that they allegedly had in the  
22 Sheriff's.

23 Why are you continuing to allow the deputies allegedly  
24 involved and accused of this misconduct working in the field?  
09:15AM 25 Because anything they work on, they're compromised. And it

1 doesn't matter if there's three other deputies that have  
2 nothing to do with the scandal, if you have one that's involved  
3 in the scandal as a percipient witness, whether the DA's office  
4 calls that witness or the defense says, "We're going to call  
09:16AM 5 him as a percipient witness, because what the deputies who are  
6 not involved in the scandal just testified is not true, and so  
7 we think that the other percipient witness will tell the truth,  
8 and so we're going to call him." And is this deputy going to  
9 then tell a different story than the other ones?

09:16AM 10 Let's assume no, that he's going to tell his version,  
11 which is inconsistent with the defendant. And then the defense  
12 has the right to cross-examine the deputy on untruthful  
13 conduct. Or worse, candidly, legally and aesthetically the  
14 deputy asserts his Fifth Amendment rights. And so then you  
09:16AM 15 have to dismiss a murder case. Because now the defendant is  
16 being denied his right to compulsory process.

17 So that's the issue I have, Mr. Marrett. And I -- I'm  
18 basing this on some information, inside knowledge that I have.  
19 Some of it is just based on what I read in the newspapers. But  
09:17AM 20 I think if you check that file, you'll see that Deputy Larson  
21 asserted his Fifth Amendment rights. And your papers indicate  
22 Deputy Larson is a percipient witness to this search. And I  
23 take from Mr. Scott's motion, he is going to play this card  
24 hard. I don't know if that's a fair statement.

09:17AM 25 Do you have -- I think it's important because I'm not



1 obviously Judge Goethals, and I'm not Judge King. Do you have  
2 more up-to-date information? Anything I said inaccurate or  
3 incomplete?

4 MR. SCOTT: Nothing the Court said is inaccurate to  
09:18AM 5 the best of my knowledge, including the fact that we are going  
6 to pursue this vigorously at trial. Call it playing this card  
7 or pursuing this aspect of the case, we're certainly going to  
8 do that with vigor. And it is our intention to make this very  
9 much what Mr. Govey's trial is about or at least a large facet  
09:18AM 10 of it.

11 What I would add are specific facts that we put into the  
12 record that relate to Mr. Govey himself beyond just the Orange  
13 County scandal generally. My understanding -- and my  
14 understanding is based on conversations with his former  
09:18AM 15 attorney -- Mr. Govey's former attorney who litigated his 2012  
16 case in Orange County, as well as the at least publicly  
17 available documents in that case, is that Mr. Govey himself was  
18 one of the early key victims, for lack of a better word, or key  
19 figures in the Orange County scandal. And he was one of the  
09:19AM 20 persons that Attorney Scott Sanders spoke to and helped develop  
21 a lot of this information early on.

22 To be even more specific, and I did put this in my papers,  
23 but I'll just say it for the record as well, but my  
24 understanding is that Mr. Govey was absolutely one of the  
09:19AM 25 inmates that the Orange County sheriffs would try to plant

1 informants and inmates in close proximity to, in his cell,  
2 around his cell in an attempt to talk to him in violation of  
3 *Massiah*, as the Court had said.

4 I should also say more specifically that one such inmate  
09:19AM 5 is a gentleman by name of Frosio, and I believe that's  
6 F-r-o-s-i-o.

7 THE DEFENDANT: Yes.

8 MR. SCOTT: Alexander is his first name?

9 THE DEFENDANT: Yes, sir.

09:20AM 10 MR. SCOTT: And this came to a head when, as I  
11 understand it, when among the documents that the Superior Court  
12 judge in Mr. Govey's case ordered turned over was the,  
13 quote-unquote, "Frosio file," the informant file, the  
14 cooperator file for this informant Frosio, was among the  
09:20AM 15 materials. Not exclusively materials, but among the materials  
16 that the DA was ordered to turn over. And then shortly  
17 thereafter, the case was dismissed instead, which was also  
18 Judge Goethals, who I understand was the trial judge on that  
19 case.

09:20AM 20 So I say that just to sort of augment the record on that  
21 part, but also to make very clear that, you know, beyond our  
22 more general *Henthorn* and *Giglio* request, we're also asking for  
23 that Frosio file along with everything else.

24 Some other things that I understand happened to Mr. Govey  
09:20AM 25 is that there were efforts to persuade other inmates to turn on

1 Mr. Govey, that there's some pretty hard evidence of them  
2 offering both carrots and sticks to try to turn them as  
3 informants against Mr. Govey for the earlier case, attempts to  
4 talk to Mr. Govey directly on the part of officers, so not even  
09:21AM 5 using the informant intermediary while he was in custody.

6 And then as I understand it, at least, the attorney in his  
7 underlying case was able to make a pretty good prima facie case  
8 that officers in this case, specifically Officer Beeman whose  
9 name I put in the papers, but who hasn't come up yet, presented  
09:21AM 10 testimony before the grand jury, that appears to have been  
11 false regarding Mr. Govey and his role both in the gang that  
12 he's alleged to be in as well as in his standing in that same  
13 group as well as some of the underlying conduct.

14 And so I say that to articulate the Frosio thing to also  
09:22AM 15 make clear that this Officer Beeman, I believe, is also at the  
16 epicenter of this. He may not have invoked his rights the way  
17 that Larson did at some point, but I do have a good-faith  
18 belief from prior counsel that he arguably perjured himself in  
19 front of the grand jury, that he is also --

09:22AM 20 THE COURT: Grand jury in what case?

21 MR. SCOTT: In the state case. It was the --

22 THE COURT: The 2012 case?

23 MR. SCOTT: That's my understanding, that it was  
24 a -- you know, I don't want to say rare, but rather than going  
09:22AM 25 to prelim, they elected to use a grand jury in the state case,

1 which they have the right to do. And I understand he was  
2 untruthful. That's what I'm told by the underlying attorney as  
3 part of the backstory of this being dismissed over there.

4 And then finally, in addition to Beeman and Frosio, just  
09:22AM 5 to make clear, that these things happened to Mr. Govey himself.  
6 This isn't just sort of the specter of Orange County more  
7 generally.

8 So with that, I think I've kind of completed my part of  
9 the record on the Orange County thing, and I appreciate the  
09:23AM 10 Court letting me do that.

11 THE COURT: Mr. Scott, do you -- can you confirm and  
12 corroborate that Deputy Larson did assert his Fifth Amendment  
13 rights in the Ortiz case? Had you heard that?

14 MR. SCOTT: I have heard that anecdotally. I would  
09:23AM 15 not have been able to quote page and verse to the name of the  
16 case and case number. But what the Court shared is absolutely  
17 consistent with my understanding. So I agree, I don't think  
18 the Court's wrong. I would not have been able to give the same  
19 level of detail as the Court did, but it is my understanding  
09:23AM 20 that he invoked in a subsequent hearing about these issues.

21 And I'll tell you, I think that in our case, it would be  
22 fair game for me to ask him the very same questions. Setting  
23 aside the act of him invoking and "Isn't it true you invoked?"  
24 that's not what I'm talking about for the moment. I think it  
09:23AM 25 would be fair to ask him the exact same questions that he

1 invoked on before because I think it would, you know, show that  
2 he perjured himself. That would be absolutely essential to his  
3 credibility. And I think the Court's right, then he has a  
4 choice. Either he invokes again here on the witness stand or  
09:24AM 5 he, you know, is forced to admit that he did commit serious  
6 misconduct. Or I guess the third option is that arguably he,  
7 you know, tells an untruth about that here on the witness  
8 stand.

9 THE COURT: Or fourth, he says, "I invoked my rights  
09:24AM 10 before because that was the advice of counsel. But I'm here to  
11 tell the truth. And I told the truth before Judge Goethals  
12 despite what Judge Goethals may or may not have thought or  
13 found, but I told the truth, and I'm going to tell the truth  
14 now."

09:24AM 15 But I think the point I'm making, and I know you agree,  
16 but for Mr. Marrett, I can't exclude you from going into that  
17 because it relates directly to the truthfulness of the witness.  
18 And he's a percipient witness. So I'm not aware of any law  
19 that would allow it.

09:25AM 20 And I understand Judge Selna's decision, but again, that  
21 was made before all the intentional misconduct findings were  
22 made and before Deputy Larson asserted his Fifth Amendment  
23 rights. This is not legalese, I'm just trying to give --

24 Unless, Mr. Marrett, is this news to you what I'm saying  
09:25AM 25 about him invoking his Fifth? Are you aware of that?

1 MR. MARRETT: I am aware of that, Your Honor.

2 THE COURT: So we don't -- I don't need to do a  
3 quick search. Because I think it was in the "Register" or the  
4 "OC Weekly" where I read that. Or it might have been the  
09:25AM 5 "Daily Journal." I can't remember.

6 MR. MARRETT: Your Honor, I do want to unpack this a  
7 little bit because I think, you know, we are sort of -- this is  
8 sort of an Indictment on just the Orange County Sheriff's  
9 Department generally as far as what Mr. Scott intends to bring  
09:25AM 10 up as his defense in this case. My understanding is that there  
11 is no finding against Deputy Larson by Judge Goethals that he  
12 was untruthful in any testimony. And even if there was, I  
13 don't think that finding would be admissible here. It's  
14 hearsay, and I think --

09:26AM 15 THE COURT: I agree with -- I agree with that, but  
16 defense is entitled to inquire under 608 any acts of  
17 untruthfulness.

18 MR. MARRETT: Well, but I think, Your Honor, part of  
19 the basis of that is there has to be some untruthfulness in the  
09:26AM 20 first instance, and there is no finding that Deputy Larson was  
21 untruthful. In order to bring that into evidence and  
22 cross-examine him on it, they would have to prove up that by  
23 extrinsic evidence, which the rules don't allow them to do,  
24 that, in fact, he was untruthful. There is no -- there's  
09:27AM 25 nothing in the record that shows that Deputy Larson's testimony

1 was untruthful.

2 THE COURT: We're going to miss each other. I'm  
3 concerned about how much we're going to have to hear of this,  
4 and that's unfortunate. But under 608, Mr. Scott can ask a lot  
09:27AM 5 of questions about this. Can he then put on his own evidence  
6 and prove it up with extrinsic evidence? No, he cannot. I  
7 don't disagree with you. But he can ask a lot of questions.  
8 And I'm here to tell you, I don't see how I can prevent him.

9 I agree with you, Judge Goethals, I did -- do know made  
09:27AM 10 some credibility findings on some of the deputies. I don't  
11 know if he highlighted Deputy Larson specifically. I believe  
12 he did highlight Deputy Tunstall; I don't know if he did  
13 Larson. But I do know Larson was one of the four critical  
14 witnesses in that scandal. And I don't think they testified  
09:28AM 15 inconsistently. Some knew more than others. And I do know  
16 that Deputy Larson asserted his Fifth Amendment rights and it  
17 seems you're confirming that.

18 And so the question, I don't disagree with you that if  
19 Judge Goethals made a finding, that should come here, no. That  
09:28AM 20 would be, I think, improper hearsay opinion. But Mr. Scott is  
21 entitled to ask about any untruthful acts. And when -- I don't  
22 know whether him asserting his Fifth Amendment rights in this  
23 case, that might -- that might come out. I don't know.

24 MR. MARRETT: Well, Your Honor, I want to, I guess,  
09:29AM 25 maybe even take a step further back. There's no allegation, at

1 least by the defense in this case, that there were any  
2 informants used; that any of what is the alleged misconduct --

3 THE COURT: I understand. I'm going to -- I'm going  
4 to assume that. But it's really at the get-go. You have a  
09:29AM 5 percipient witness. And a percipient witness is going to say,  
6 "This is what went down."

7 And Mr. Govey disputes that, "That's not how it went down.  
8 I wasn't in control or possession of the counterfeiting  
9 evidence or the drugs. I wasn't -- it ain't mine."

09:29AM 10 And Deputy Larson and the other deputy are going to  
11 present testimony, "No, it was."

12 Mr. Scott's going to now get to cross-examine. He gets to  
13 cross-examine on motive, bias and untruthfulness and he can ask  
14 away as long as he has a good-faith basis and he's just not  
09:30AM 15 making it up, "Tell me about all acts of untruthfulness." And  
16 that's going to get you right into the informant's scandal.

17 So it's going to be a question of there's no way -- I  
18 mean, I'm just being candid with you, there's no way I'm going  
19 to exclude him from asking these questions. I think I would  
09:30AM 20 get immediately reversed in a nanosecond. What I can do is  
21 maybe try to control -- I don't see by subject matter, but  
22 maybe by time limits. I mean, how -- because what I don't want  
23 to do is have a retrial of the informant scandal.

24 But he's going to be able to ask questions, but then we're  
09:30AM 25 assuming that Deputy Larson is going to even answer any



1 question when Mr. Scott starts asking him a question about the  
2 informant scandal of what he allegedly did or did not do. If  
3 he asserts his Fifth Amendment rights, we have a problem. And  
4 that's obviously got to happen outside the presence of the  
09:31AM 5 jury.

6 MR. MARRETT: I think, you know, Your Honor said  
7 that you don't want this to devolve into a retrial in the  
8 *Dekraai* case, and I think that's part of the --

9 THE COURT: Yes, because I think Judge Goethals,  
09:31AM 10 what was it, like, two years?

11 MR. MARRETT: Well, and I think that's part of the  
12 problem is that once we start going down this road, it is  
13 effectively a retrial in the *Dekraai* case. There are no  
14 findings against -- against Deputy Larson. There's nothing to  
09:31AM 15 suggest in the record that Deputy Larson was involved in the  
16 2012 case with this defendant. So there's no bias that's been  
17 tied specifically to Deputy Larson as a witness.

18 And so in order for the defense to get into this, they're  
19 going to have to get into effectively a retrial in the *Dekraai*  
09:32AM 20 case, which then will, I think, confuse and mislead the jury  
21 into believing that that's what this case is about, when  
22 there's no allegation much less evidence in the record that  
23 there is an informant or any of the other sort of underlying  
24 issues that were related to the *Dekraai* case.

09:32AM 25 THE COURT: Mr. Marrett, I share your concerns,

1 but -- and I might have a disagreement, I cannot and I will not  
2 preclude Mr. Scott from asking questions about that. I don't  
3 see -- he's -- Larson's a percipient witness. You have serious  
4 allegations of misconduct against him. So serious that he, an  
09:32AM 5 officer in uniform in a murder case, asserted his Fifth  
6 Amendment rights.

7 Mr. Scott has a good-faith basis to inquire into this. I  
8 share your concern. How unfortunate it is that we're going to  
9 get into this, but I don't see as a matter of law how I can  
09:33AM 10 say, "You're not going to ask him any questions about that." I  
11 would be denying the defense the right to cross-examine --

12 MR. MARRETT: Well --

13 THE COURT: -- under 608.

14 MR. MARRETT: Well, I think, Your Honor, if the  
09:33AM 15 Court is -- obviously I'm fighting an uphill battle here. I  
16 think one of the things that the government would request is  
17 that the Court in advance set the limitations and the  
18 parameters around what the extent of that cross-examination can  
19 be.

09:33AM 20 THE COURT: See, I can't -- I can -- what we're  
21 going to have to do candidly to resolve this, if you're going  
22 to pursue the issue, is we're going to have to schedule an  
23 evidentiary hearing where Deputy Larson's here and you're going  
24 to need to do a dry run. And you're going to need to ask the  
09:34AM 25 questions that you're going to ask at trial in front of the

1 jury, and then I'm going to need to give Mr. Scott -- ask his  
2 questions, because I've got to make an informed decision.

3 I'm not familiar with the informant scandal other than  
4 what I've read in the newspaper. And then I did read

09:34AM 5 Judge Goethals' opinions months ago, but I just read them.

6 So -- and a lot of this might be moot because -- I don't want  
7 to speculate, but if Deputy Larson has asserted his Fifth  
8 Amendment rights, I would think there's a good chance he's  
9 going to assert his Fifth Amendment rights here if asked about

09:35AM 10 that. And I'm here to tell you, I'm going to let him, at least  
11 in an evidentiary hearing. Mr. Scott's going to be able to ask  
12 some questions.

13 So is he going to take a position different than he did in  
14 the Ortiz case? Do you know?

09:35AM 15 MR. MARRETT: I don't know what he's going to do,  
16 Your Honor, if asked those same questions.

17 THE COURT: See, because -- and it sounds like I'm  
18 arguing with you, but I'm more concerned if that's what you  
19 sense in my tone.

09:35AM 20 We need a little bit more information. I'm aware of him  
21 asserting his Fifth Amendment rights. I am not -- at least in  
22 an evidentiary hearing, I'm going to at least allow Mr. Scott  
23 an evidentiary hearing outside the presence of the jury to ask  
24 questions concerning this scandal, because Mr. Scott has  
09:36AM 25 represented to me in writing and here today that he believes

1 Deputy Larson was dishonest and untruthful and engaged in  
2 willful misconduct. So that goes to his credibility as a  
3 witness.

4 So we're going to have a hearing. He's going to be asked  
09:36AM 5 those questions on cross-examination, and he might -- he might  
6 not even, once he knows that this is coming, he might not even  
7 answer your questions. And if he doesn't answer your questions  
8 or he asserts his Fifth Amendment during Mr. Scott's  
9 questioning, we got a problem; right?

09:36AM 10 MR. MARRETT: Sure. I don't disagree with the Court  
11 there, Your Honor, if he invokes his Fifth Amendment rights,  
12 and there's a whole separate issue involved.

13 THE COURT: Yeah. So I don't -- I don't know  
14 exactly how you want to resolve this or how we can procedurally  
09:37AM 15 and timewise, but we got to resolve it before we impanel a jury  
16 on this case.

17 MR. MARRETT: I do think, Your Honor, an evidentiary  
18 hearing would be appropriate, No. 1. I think it's, you know,  
19 certainly outside the presence of the jury if Mr. -- excuse  
09:37AM 20 me -- Deputy Larson is going to invoke, that that's done  
21 outside the presence of the jury.

22 In addition, I think it's a good idea to hold an  
23 evidentiary hearing or to at least frame the issues and draw  
24 limits and parameters around what cross-examination can be done  
09:37AM 25 in front of the jury.

1 THE COURT: All right. Now again, thinking out loud  
2 is a dangerous thing, but Mr. Scott, you've been nothing but  
3 professional and civil in all my dealings with you, and we've  
4 had some pretty tough cases. Mr. Govey has a speedy trial  
09:37AM 5 right, and I know he has been adamant he wants to go to trial  
6 on January 9. I don't know under the law technically if we  
7 have this evidentiary hearing involving a pretrial motion that,  
8 you know, we've satisfied it or not.

9 So I don't know whether I should just let you two confer  
09:38AM 10 and see if you can agree on a process for this and a time for  
11 this evidentiary hearing or how you want to proceed. But I  
12 guess I just -- I want -- because I have an obligation to not  
13 only protect Mr. Govey, but I have an obligation to protect  
14 Deputy Larson too, and I take that seriously.

09:38AM 15 I would want him to know that he's going to be asked  
16 questions about the informant scandal. I don't want him  
17 blindsided by this. And he might want to have counsel present;  
18 right? I mean, you can't represent him.

19 MR. MARRETT: That's correct, I can't advise him.

09:39AM 20 THE COURT: So he's going to need his counsel  
21 present too. And it would be helpful for all our planning  
22 purposes whether he can give us an indication, is he going to  
23 assert his Fifth Amendment rights. Because if he does, then  
24 the hearing will go a certain way and we'll have specific  
09:39AM 25 questions. He goes on the record, he asserts his rights, and

1 then I have to make a decision whether that's a valid assertion  
2 of the privilege. If I do, then we're going to have to see  
3 what happens in this case. If I say it's not, guess what I  
4 have to do? I have to put a sworn police officer in custody if  
09:39AM 5 I don't sustain the privilege.

6 If I say, "You know what, no, you got to answer this," and  
7 he won't talk, then I've got to exercise my contempt powers and  
8 get him to purge. You see what I'm saying? Maybe none of this  
9 will happen. Maybe he will come here, he will answer your  
09:40AM 10 questions, Mr. Marrett, he'll answer Mr. Scott's questions, and  
11 then I will conclude, you know, this is a fishing expedition.  
12 You're trying to have a retrial of the evidentiary hearing that  
13 took months, you know. I don't know which way this is going to  
14 go. All I'm saying, this is a problem and this is an issue we  
09:40AM 15 have to address.

16 MR. SCOTT: Can I share a thought or two, Your  
17 Honor? I'm not sure which way it's going to go either, but I  
18 have to prepare for either way it's going to go. One concern  
19 that I have now hearing the government's view and some of the  
09:40AM 20 questions from the Court is there's at least the possibility  
21 that the officer -- the deputy take the fourth option that the  
22 Court described where, "Yes, I invoked before, but that was --  
23 you know, my attorney told me to do it in an abundance of  
24 caution, and here I am today to tell the truth."

09:41AM 25 And the government kind of alluded to that, you know, that

1 I can ask questions under 608, but then I take the answer as it  
2 sits and no extrinsic evidence. So my concern with that is if  
3 we take that sort of agnostic approach --

4 THE COURT: Can I interrupt you?

09:41AM 5 MR. SCOTT: Yes, please.

6 THE COURT: I was incomplete. If we're dealing with  
7 character for truthfulness or untruthfulness, you're stuck with  
8 the answer. But if you're, as I understand it -- I'm not  
9 putting words in your mouth, your brief made this clear.

09:41AM 10 You're going beyond untruthfulness -- you're saying motive,  
11 bias, this was a vindictive prosecution.

12 MR. SCOTT: That's right.

13 THE COURT: That's different. You can prove that up  
14 with extrinsic evidence. I know that.

09:41AM 15 MR. SCOTT: Okay.

16 THE COURT: But I don't want to sit here and start  
17 scripting your case. I don't know what they're going to say.  
18 But I can say in the evidentiary hearing you're going to have  
19 pretty wide latitude to ask whatever you want. And then I can

09:42AM 20 figure it out and make an informed decision, okay, is this  
21 inquiry relevant to motive, bias, or truthfulness or  
22 untruthfulness of a witness? If it's dealing with  
23 untruthfulness of a witness, you're limited by no extrinsic  
24 evidence. But like I indicated before, you may be able to ask  
09:42AM 25 over an hour, two hours of questions about it.

1           If it's a retrial of Goethals, like I said, that was  
2 months and months and months of testimony. I can't believe you  
3 want to do a retrial of all that. But you might want to be  
4 spending some time on this. And if this goes to motive, bias,  
09:43AM 5 you're going to be able to call up your own witnesses. And  
6 you're not limited by the 608.

7           MR. SCOTT: So for what it's worth, the Court's not  
8 arguing my case for me. I was going to make that same argument  
9 about motive and bias and being able to build a case like that.  
09:43AM 10 But I won't belabor that anymore because the Court said it  
11 well.

12           The concern I was starting to address is for the sake of  
13 argument, if there are strictly 608 extrinsic evidence issues,  
14 the concern that arises for me at that point is that I think it  
09:43AM 15 becomes a discovery issue. I'm uncomfortable with sort of the  
16 agnostic approach of having the officer testify. You know, we  
17 take him at his word and then that's it. The remedy that I  
18 have for that is a robust *Henthorn* and *Giglio* disclosure  
19 combined with the government's ethical and constitutional *Napue*  
09:44AM 20 limitations on not being able to present or even passively  
21 allow a witness to say things even on cross is my understanding  
22 of the law that it knows not to be true.

23           And so the reason I bring that up is not in any way to  
24 suggest that Mr. Marrett or his office would do that, but my  
09:44AM 25 concern is -- not knowingly, but my concern is that if we don't



1 get robust disclosure of the files that were ordered to be  
2 turned over in Superior Court as well as the files that the  
3 Department of Justice civil division is evidently building and  
4 investigating in this case, then in addition to the 608  
09:44AM 5 limitation, I'm also deprived of the limitation that exists  
6 under the Constitution and under the ethical rules to prevent  
7 this officer from arguably being able to say things that I  
8 can't impeach.

9 So that's a long way of sort of reraising and reaffirming  
09:45AM 10 the discovery request that I've made in this case, which then  
11 leads me to the timing issues that the Court brought up. We're  
12 approaching an unenviable position where trial is upon us. We  
13 have not been provided any of that discovery. And I agree with  
14 the Court, that in the best of all worlds, I would be able to  
09:45AM 15 take more time to prepare for the evidentiary hearing that we  
16 envision and to build a potential bias and motive case.

17 I think that that's kind of a somewhat unfair position to  
18 put Mr. Govey in. Certainly he's adamantly asserting his  
19 rights to speedy trial. I don't quarrel with the Court that  
09:45AM 20 under 3161, once you file motions, that's tolled. So I don't  
21 think that it's, strictly speaking, a statutory speedy trial  
22 issue, but I do think that he's not unreasonable and not wrong  
23 to say, you know, we've had this trial date for some time. It  
24 was continued once with some misgivings, and he shouldn't be,  
09:46AM 25 you know, punished for these things that are going on in Orange

1 County by moving it back further.

2 My preference would be either to have robust and immediate  
3 disclosure of this information and then stay on track for  
4 January 9. Or even better, if we want to measure twice and cut  
09:46AM 5 once and kind of do this in a more deliberate and thorough  
6 fashion, I would want to make an application for bail for  
7 Mr. Govey, and that would take the pressure off a little bit.  
8 At least he's not in custody waiting for his day in court.

9 And I think under these unique circumstances, that would  
09:46AM 10 be a change in circumstance that would justify some sort of  
11 modest and reasonable bail for him to be able to fight this  
12 case from the outside.

13 THE COURT: I understand. And we need to talk about  
14 this, because this relates to one of your motions, Mr. Scott,  
09:47AM 15 to compel discovery. And my tentative on that was to deny it  
16 without prejudice. And my thought is I can't micromanage the  
17 government's *Brady*, *Giglio* and *Henthorn* obligations, and I know  
18 you know that. So I can't be looking over their shoulder and  
19 going through the whole file with Judge Goethals and now  
09:47AM 20 Judge King on that case and trying to say, "Did you turn  
21 everything over that you were supposed to?"

22 And in fairness to Mr. Marrett, there's a lot of  
23 information. You know, he was hoping that this was going to be  
24 completely off the table. He now knows it's not off the table.  
09:47AM 25 So there is a pretty burdensome -- you used the word "robust."

1 I'll use -- there's a very robust investigation he has to do  
2 and thorough research.

3 And yes, I can put pressure on him to do it, but, you  
4 know, there's only so many hours in the day and there's only so  
09:48AM 5 many people that can be devoted to this without tripping over  
6 themselves. And he will produce the stuff as he gets it, but  
7 then it's kind of in a situation where, Mr. Scott, you're in a  
8 difficult situation because you have a client who's very  
9 anxious to push this and push it forward. And, you know, I  
09:48AM 10 don't know how you resolve that tension quite frankly.

11 Government says, "Okay, we disagree with you, Judge, we  
12 shouldn't have to do this, but you're ordering us to do it.  
13 We'll do it. But we might not have it done by January 9th. We  
14 might not even have it done until February or March." Because  
09:49AM 15 like I said, it's a lot of documents. I mean, I don't know how  
16 I resolve this. And so then you can take the risk of, okay,  
17 well, we'll just go to trial on what we have, and then in  
18 habeas we'll figure out if there was something that was  
19 withheld that should have been disclosed, you know.

09:49AM 20 Do you understand what I'm saying? I can't do his job,  
21 and he's -- he might have a couple lawyers help him to try to  
22 figure out what's there and get to you everything that they  
23 have to get to you, but I don't know how long that's going to  
24 take, because I am aware that there's extensive record on this  
09:49AM 25 informant scandal.

1 MR. MARRETT: I do want to share with the Court that  
2 the government does take its discovery responsibility  
3 seriously. This morning -- earlier this week or late last  
4 week, Mr. Scott made another discovery request to the  
09:50AM 5 government that's not the subject of this motion. And this  
6 morning we produced over a thousand pages of documents to the  
7 defense, you know, on a disk that responds to that discovery.  
8 And the government is, you know, doing its diligence to  
9 promptly review and produce whatever information that would be  
09:50AM 10 subject to Rule 16 or *Brady* or *Giglio* that it has in its  
11 possession.

12 THE COURT: All right. I'm thinking off the top of  
13 my head, so this might be a bad idea. And please tell me if  
14 you think it is, but does it make sense, maybe we should even  
09:50AM 15 try today or soon, let's check in with Deputy Larson. Because  
16 if he says, "I'm asserting my Fifth," we'll have to go through  
17 that process. But, you know, the government might just say,  
18 "If he's going to assert his Fifth, that's a critical  
19 percipient witness, I don't know how we can proceed."

09:51AM 20 MR. MARRETT: And, Your Honor, I'm not sure on the  
21 timing of this, because if this issue comes up, Deputy Larson  
22 may want to retain counsel, and he'll need time to do that and  
23 confer with his counsel.

24 In the meantime, the government will comply with the  
09:51AM 25 discovery obligations and look through these materials. But I

1 don't know if today or any time this week would be reasonable  
2 for Deputy Larson to come to an informed decision on what he's  
3 going to do.

4 THE COURT: Well, I can tell you, he is going to  
09:51AM 5 have to get counsel because I will make sure he gets counsel.  
6 I've been told he asserted his Fifth Amendment rights, so I  
7 have a duty and obligation to protect all witnesses. So I have  
8 to make sure that whatever he decides to do is based on  
9 informed counsel. And I have to believe that the County has  
09:51AM 10 appointed him counsel. So I don't know who that is.

11 Do you know?

12 MR. SCOTT: I don't, Your Honor. The thing I was  
13 going to add is -- and I understand the tension that the  
14 Court's describing, the argument I would make, and I think in  
09:52AM 15 all fairness, Mr. Govey was indicted in August. And I  
16 understand the government may have disagreements. We don't  
17 think it's relevant, but we'll sort of comply with the Court's  
18 order. But I think an argument can be made that while being in  
19 a legal community in Orange County and, you know, just reading  
09:52AM 20 the newspaper, it's not inconceivable that this would come up.  
21 And I would have hoped that the government would have started  
22 their *Henthorn* and *Giglio* process when they indicted this case  
23 in August.

24 So I think -- you know, I'm not totally persuaded that  
09:52AM 25 this is an 11th-hour burden that's been thrown on the

1 government unfairly in some way or they couldn't have seen this  
2 coming. So I would just say that.

3 THE COURT: Your rights on that are fully preserved,  
4 and all I'm saying is I don't know. That's why I was denying  
09:53AM 5 the motion without prejudice. I can't micromanage him. I  
6 don't know what's been produced, what was withheld, why it was  
7 withheld. I don't have a sense of what more needs to be done.  
8 And I guess I need you guys to tee it up for me and then tell  
9 me what you want. If you want to file a motion, you can do it.  
09:53AM 10 But at this point, I feel at a loss. I don't know.

11 MR. SCOTT: So just for the record, I'll say -- and  
12 without ascribing any specific intent, so to speak, or any  
13 malintent on the part of the government, that we received zero  
14 discovery in terms of the Orange County scandal or impeachment  
09:53AM 15 on Larson or Beeman or any deputies or the Frosio file or any  
16 of these things we've been talking about, there's been no  
17 disclosures. And I say that, again, without accusing the  
18 government of anything. That's just a factual statement for  
19 the record.

09:54AM 20 But I would reiterate my point. I think that in  
21 conferring here briefly with Mr. Govey, we would be  
22 comfortable, you know, resolving this in a more thorough and  
23 deliberate fashion in February or March, if I can get him bail  
24 so that he's not prejudiced by, you know, working this through.

09:54AM 25 I can represent to the Court that the methamphetamine case

1 that he stands charged with here in Federal Court was  
2 originally charged in State Court. And that's separate and  
3 apart from the 2012 conviction that -- 2012 case that I've been  
4 describing earlier. This was just a sort of pedestrian drug  
09:54AM 5 possession case, possession with intent to distribute in Orange  
6 County Superior Court, and he was out on bond on that case,  
7 made bail, was complying with bail. Was then arrested actually  
8 at a court hearing for that case and then brought over to  
9 Federal Court where he was detained.

09:54AM 10 And so I bring that all up just to say that I think this  
11 isn't a case where he needs to be detained. I think there are  
12 changes in circumstances. I think that we should figure out  
13 bail and then we can resolve this, you know, whether it be  
14 February or March or whatever is good for the parties to allow  
09:55AM 15 the government to comply with its discovery obligations.

16 MR. MARRETT: So two things, Your Honor: First,  
17 defense request for this broad discovery and especially the  
18 underlying state files in the *Dekraai* case, the request was  
19 only made about two-and-a-half weeks ago. So the cases were  
09:55AM 20 pending since August, this specific request for this  
21 information, which at the time, the government didn't believe  
22 was relevant was only made two-and-a-half weeks ago. And the  
23 government's been working since then to review and produce  
24 documents.

09:55AM 25 I think the application of bail is a separate issue.

1 There are separate considerations at play. I think if the  
2 defendant wants to make that application, he should make it in  
3 writing to the Court and allow the government to respond in  
4 writing before the court makes a decision on that.

09:55AM 5 THE COURT: Well, I agree with that. But I think he  
6 should make it right away. And it does -- it has some appeal  
7 quite frankly. Unless I'm overstating it, I think you got a  
8 lot of work to do, unfortunately, not preparing your case to go  
9 to trial, to deal with this discovery. Because I just have to  
09:56AM 10 believe there's an enormous amount of information that you have  
11 to go through to see "what of that I have to turn over." And  
12 if you're saying you only started this two weeks ago, you're  
13 not even close to having done the investigation that's  
14 necessary.

09:56AM 15 MR. MARRETT: Sure. And I think, though, that  
16 discovery issues are a separate consideration from things like  
17 danger to the community, intervening between the time defendant  
18 made bail in State Court and his arrest on the federal  
19 Indictment. There was a second arrest in Huntington Beach. So  
09:56AM 20 there's other issues that I think need to be addressed separate  
21 on the bail motion that don't depend on the discovery.

22 THE COURT: They don't depend on the discovery  
23 certainly academically, but you understand the problem we have  
24 here, he wants to go to trial on the 9th, and the key witness  
09:57AM 25 in the case has issues, and including he might assert his Fifth



1 Amendment rights. And he can literally jam us. And we can go  
2 through this and it's going to be an ugly, terrible trial, a  
3 lot of hearings outside the presence of the jury.

4 You're going to be -- instead of worrying about your  
09:57AM 5 opening statement, witness examinations, redirect examinations,  
6 closing arguments, jury instructions, you're going to be bogged  
7 down with all this discovery. It's a train wreck. And so  
8 there's something to the criticisms that I understand is I'm  
9 not sure why these deputies are in the field when this cloud is  
09:58AM 10 hanging. Because when the cloud is hanging, every case that  
11 they're involved in is potentially compromised.

12 In this case, it sounds to me it's potentially  
13 compromised. It might not be. It might not. I hope not, but  
14 it might be. And I -- it's related, Mr. Marrett, because he's  
09:58AM 15 in custody. He doesn't want to be in custody. And because we  
16 need now more time to figure out the issues with Deputy Larson,  
17 he's got to remain in custody and he can't have his day of  
18 reckoning. So in a way, it is related.

19 MR. MARRETT: Understood, Your Honor. The  
09:59AM 20 government will respond to their bail application when it's  
21 made. I think we'll be able to, you know, offer -- enlighten  
22 the Court on the reason why detention remains appropriate  
23 pending whatever the continued trial date is.

24 THE COURT: Well, I'm also worried about the passage  
09:59AM 25 of time and the holidays and everything. So, you know, there's

1 a part of me, and please be frank, should I just give you a  
2 little time to discuss this to see if you can reach an  
3 agreement on any of it, on the scheduling, on how we proceed  
4 or what? Because I'm a little bit at a loss of where we're  
09:59AM 5 going from here. I have a lot of issues I want to talk to you  
6 about concerning jury instructions, and I don't know whether  
7 that's not a good use of our time.

8 MR. MARRETT: I'd be happy to have a discussion with  
9 Mr. Scott. I don't know if we'll be able to reach an agreement  
10:00AM 10 on anything. But I'd be happy to have a discussion with him  
11 and see if we can.

12 THE COURT: I'm here. Just tell me when you're  
13 ready.

14 MR. SCOTT: I think there's always potential  
10:00AM 15 benefits in us getting together and talking. And I see there's  
16 several members of the U.S. Attorney's Office here, so maybe we  
17 can powwow and see if there's anything that we can come up with  
18 on any of these issues.

19 THE COURT: Good. I appreciate that.

10:00AM 20 MR. SCOTT: So maybe 15 minutes or 30 minutes. I  
21 don't know what's good for the Court.

22 THE COURT: Whatever you need. Whatever you need.  
23 Because I'd much -- I'd much rather try to have some sort of  
24 game plan today.

10:00AM 25 MR. SCOTT: I agree. All right.

1 THE COURT: Okay.

2 MR. SCOTT: Very good. Thank you, Your Honor.

3 THE COURT: I'm sorry, that might include -- see if  
4 you can get Deputy Larson on the phone and get us his thoughts  
10:00AM 5 about this. If he indicates to you, "Hey, I'll talk to my  
6 attorney, but I'm going to be asserting Fifth Amendment  
7 rights," you know, maybe we don't have to go through all this.  
8 See what I'm saying?

9 MR. MARRETT: We can try to do that, Your Honor. I  
10:01AM 10 don't know if I'll be able to get ahold of him.

11 THE COURT: I understand. But I don't see how the  
12 trial can proceed if he asserts his Fifth Amendment rights,  
13 unless I'm missing something.

14 MR. MARRETT: I do think we have other witnesses who  
10:01AM 15 can testify to the percipient witnesses. But certainly --

16 THE COURT: Not on the defense of compulsory  
17 process. He has a constitutional right to call all the  
18 witnesses that are percipient, and especially if it's a witness  
19 from law enforcement who did the search. So regardless, if you  
10:01AM 20 say, "I don't want him," he's calling him.

21 MR. SCOTT: That's correct for the record.

22 THE COURT: And I got to give him -- I got to use my  
23 powers to allow that or I'd be denying Mr. Govey his  
24 constitutional right to compulsory process.

10:01AM 25 MR. MARRETT: Understood.

1 THE COURT: Okay.

2 **(Recess from 10:01 a.m. to 10:41 a.m.)**

3 THE COURT: Please be seated. Where are we?

4 MR. SCOTT: Well, Your Honor, I think it's fair to  
10:41AM 5 characterize our conversations as more pleasant than  
6 productive. I think where we're at is it's -- we had a  
7 discussion about whether we can make an agreement on bail, and  
8 I don't think that's in the cards. I think the government  
9 feels strongly that this is a detention case. So for that  
10:41AM 10 reason, we're standing by our request that we go ahead and go  
11 to trial on January 9.

12 And it's our position that, you know, the government  
13 either has to comply with their discovery obligations by then  
14 or they're at their own peril. But I think the government is  
10:41AM 15 going to make a motion to move the date over our objections,  
16 and then I'll kind of let it unfold from there.

17 THE COURT: Okay.

18 MR. MARRETT: That's accurate, Your Honor. The  
19 government is going to make a motion under 3161(h)(1)(D) to  
10:42AM 20 continue the trial date to February 13, if the Court has that  
21 available, and set an evidentiary hearing on the pretrial  
22 motion for January 30th of 2018, if the Court has that date  
23 available.

24 THE COURT: Give me that code section again.

10:42AM 25 MR. MARRETT: Sure. It's 3161(h)(1)(D), excludable

1 time for delay resulting from pretrial motions through the  
2 conclusion of such hearing on such motion.

3 THE COURT: So I have to deal with the motion  
4 promptly. And the motion I'm trying to deal with promptly is  
10:43AM 5 the motion to compel discovery as well as the motion in limine  
6 to exclude evidence, the parameters of it. That's the  
7 government's position?

8 MR. MARRETT: Yes, Your Honor, that's correct.

9 THE COURT: Okay. And there's an objection to that.  
10:43AM 10 So those dates you're talking about, the evidentiary hearing,  
11 Deputy Larson would be January what, 30th?

12 MR. MARRETT: 30th. And I have cleared the dates  
13 with defense counsel, but we haven't cleared it with the Court  
14 yet.

10:43AM 15 THE COURT: Melissa, what are we looking like  
16 January 30th?

17 **(Court and clerk conferred off the record.)**

18 THE COURT: I would like to do the evidentiary  
19 hearing earlier, but what is counsel's thinking? You need more  
10:44AM 20 documents so you can be prepared for that hearing to  
21 cross-examine or examine Deputy Larson? Is that the thinking?

22 MR. SCOTT: Well, I think if we're putting off the  
23 trial and the evidentiary hearing for purposes of disclosing  
24 discovery and giving us what we need, then I do want to have  
10:45AM 25 those things for the evidentiary hearing as much as the trial.

1 Because as the Court described it, it's essentially a dry run.

2 THE COURT: Right.

3 MR. SCOTT: And I'm saying this mostly for

4 Mr. Govey's benefit. The government did clear those dates in

10:45AM 5 the sense that I'm available those dates. I can do them those

6 dates, but I want Mr. Govey to know that I am objecting to any

7 continuance, and we're making our record on that. And I'm

8 certainly not agreeing to those dates. It's our position we

9 should go on January 9.

10:45AM 10 THE COURT: It's clear in my mind. And now it's

11 abundantly clear you're opposing it and want Mr. Govey to go to

12 trial on January 9. And all this information should have been

13 produced long ago. That's clear. But I'm in the situation,

14 it's frustrating that I find myself in this situation, but I am

10:45AM 15 going to grant the government's motion. I will want the

16 government to move with haste to get all the information

17 together and disclose it to the defense, No. 1.

18 No. 2, why don't you file, because I would like something

19 in writing, a motion for reconsideration on bail. Do you want

10:46AM 20 to do that next week?

21 MR. SCOTT: I'd like to do it as soon as -- as soon

22 as it can be heard. I don't know if the Court is even here

23 tomorrow, how quickly we can fast track this. Candidly, I

24 was -- I'm supposed to be out of the office next week. I don't

10:46AM 25 know if the Court has court next week.

1 THE COURT: Well, the Court's closed Monday,  
2 Tuesday. But these things happen. So it would have to be  
3 Wednesday of next week.

4 MR. SCOTT: Like Wednesday morning?

10:47AM 5 THE COURT: Yep.

6 MR. SCOTT: Okay. If that's what -- if that's what  
7 the Court has, we would take that.

8 THE COURT: All right.

9 MR. MARRETT: The government can be prepared that  
10:47AM 10 day. We'll file something in advance of that.

11 THE COURT: All right. So can you get me your  
12 papers in tomorrow?

13 MR. SCOTT: Yes, Your Honor.

14 THE COURT: Okay. And then government, you need to  
10:47AM 15 get your papers in Tuesday.

16 MR. MARRETT: If not sooner, yes, Your Honor.

17 THE COURT: Okay. All right. And then we'll have  
18 the hearing next Wednesday, which is the 27th at 9:00 a.m. And  
19 then we will deal with the other logistics of the trial after  
10:48AM 20 we do the bail.

21 MR. MARRETT: Okay. Thank you, Your Honor.

22 And just to be clear, the two dates that were proposed,  
23 are those the dates the Court is setting for the evidentiary  
24 hearing and the trial?

10:48AM 25 THE COURT: Trial, you're February. You said

1 February what?

2 MR. MARRETT: February 13, I believe.

3 **(Court and clerk confer off the record.)**

4 THE COURT: I have other criminal cases that date,  
10:48AM 5 so we're going to have to move it up, the trial date. Might  
6 have to move up our evidentiary hearing, then, too. Obviously  
7 any civil case I can kick, but I can't obviously kick the  
8 criminal cases.

9 MR. MARRETT: Let me confer with defense counsel on  
10:49AM 10 available dates, Your Honor.

11 **(The defendant left the courtroom.)**

12 THE COURT: What's going on?

13 MR. SCOTT: With the Court's permission, I'd like to  
14 waive Mr. Govey's presence while we're discussing sentencing  
10:49AM 15 issues. He's -- he's been pretty candid that he wanted the  
16 marshals to take him in the back so he wouldn't have a verbal  
17 reaction to the trial being moved. So he was concerned he  
18 wasn't going to be able to comport himself, so he asked to step  
19 outside.

10:49AM 20 THE COURT: Okay. So he waived his presence. He  
21 just left.

22 MR. SCOTT: Yes, Your Honor.

23 THE COURT: A little disappointed, but he can't be  
24 just getting up and leaving when he wants to. It's not an ego  
10:50AM 25 thing. This is quite frustrating that I'm finding myself in



1 this position, to be honest with you. I've got an incredibly  
2 busy criminal calendar, let alone I got some civil cases that  
3 have been years and I'm pushing them out, and I just don't  
4 understand why I'm getting jammed with this this time.

10:50AM 5 How could the government not know these issues with  
6 Deputy Larson when they went to the grand jury for an  
7 Indictment?

8 MR. MARRETT: Well, again, Your Honor, I don't think  
9 largely there are going to be very many issues with  
10 Deputy Larson at the end of the day. And largely, I think the  
11 documents that the defense counsel has requested aren't  
12 documents that are in the government's possession, they're  
13 documents that might be with the state DA or they might be  
14 other publicly available documents that are accessible by both  
10:50AM 15 the defense, and there's equal access to those documents.

16 THE COURT: I guess, Mr. Marrett, I'm not trying to  
17 shoot the messenger, but, you know, putting aside the  
18 voluminous nature of the documents, you have a deputy that's  
19 asserting his Fifth Amendment rights in uniform in a court.  
10:51AM 20 That is very, very significant. You know that's a problem  
21 witness. That's the problem I'm having.

22 Put aside the voluminous amount of information and  
23 documents and whether all of that is relevant, the defendant  
24 has a right to cross-examine every key percipient witness. And  
10:51AM 25 he has the right to cross-examine him on truthfulness or

1 untruthfulness. And rightfully or wrongfully, the deputy has  
2 been accused of giving false testimony and intentional  
3 misconduct of violating defendant's constitutional rights.  
4 They might not be true, but the issue is there front and  
10:52AM 5 center. That's a problem. It's going to be dealt with in  
6 every case that he is a percipient witness. Every single case  
7 it's going to be an issue.

8 And so now I've got a defendant who has his own issues and  
9 he's screaming he wants his trial now. He feels this is a  
10:52AM 10 vindictive prosecution. I mean, it looks bad. It makes us all  
11 look bad. And I don't understand, you know, why this happened.  
12 This issue should have been -- it should have been thought  
13 through and should have been at the time the Indictment was  
14 returned. Because an Indictment you should be ready to go to  
10:52AM 15 trial; right?

16 MR. MARRETT: Understood, Your Honor. And, you  
17 know, for the record, as the Court asked us to do, to try to  
18 reach out Deputy Larson obviously, I think he's going to be --  
19 he's going to need to have counsel appointed for him before he  
10:53AM 20 testifies, but all indications are that he will testify at the  
21 evidentiary hearing and at the trial. So I think largely these  
22 concerns are going to be allayed at the end of the day, and we  
23 will be able to move forward with the presentation of the  
24 government's case.

10:53AM 25 THE COURT: Did you -- I'm not holding you to it,

1 but you made contact with someone who said he's going to  
2 testify? He's not going to assert his Fifth?

3 MR. MARRETT: I spoke with Deputy Larson during the  
4 break.

10:53AM 5 THE COURT: And he said, "I'll testify"?

6 MR. MARRETT: The indications are that he is going  
7 to testify.

8 THE COURT: Okay.

9 MR. MARRETT: He's going to obviously, I think, you  
10:53AM 10 know, have counsel appointed and advise him on ultimately what  
11 to do, but the indications are that he's going to testify  
12 and -- and both in the evidentiary hearing. And I think  
13 largely at the evidentiary hearing, I think a lot of these  
14 issues that are, you know, seemingly broad and vast right now,  
10:54AM 15 I think we'll be able to narrow it down to what's potentially  
16 even relevant to the trial in this case, which I think, if  
17 anything, will be a very limited universe, and we'll be able to  
18 go to trial and present our case.

19 THE COURT: Okay. All right. So the problem we  
10:54AM 20 have is the dates you want, I have other criminal jury trials  
21 that are not waiving time and have represented to me that  
22 they're going forward.

23 MR. MARRETT: So I suppose as far as the evidentiary  
24 hearing, if the Court's available on a day other than a Tuesday  
10:54AM 25 during the week of January 30th, I don't know how long the

1 other trials are scheduled for, but perhaps one of those dates  
2 would be available. And I obviously have to confer with  
3 defense counsel as well to make sure those dates are open.

4 THE COURT: Well, the evidentiary hearing, I can  
10:54AM 5 accommodate you. It was the trial that I couldn't accommodate  
6 you. So then I said, okay, I've got to give you an earlier  
7 trial.

8 So when is the best possible date, Melissa, I can give the  
9 jury trial in this case? And then once we figure out that  
10:55AM 10 date, then we can figure out when we're going to have this  
11 evidentiary hearing.

12 **(The Court and clerk conferred off the record.)**

13 THE COURT: How long will this trial be?

14 MR. MARRETT: Two to three days, Your Honor. I  
10:55AM 15 believe the government's case in chief will be two days, and  
16 the defense is --

17 THE COURT: Depends on whether -- defense could be  
18 several months.

19 **(The Court and clerk conferred off the record.)**

10:56AM 20 THE COURT: I think we're going to have to set the  
21 jury trial date for January 30th at 9 o'clock. And we're going  
22 to have to have the evidentiary hearing -- we're going to have  
23 to have that -- I think we're going to have to do it either the  
24 9th or some day the week of the 9th.

10:56AM 25 MR. MARRETT: I'm available those days, Your Honor.

1 I don't know if defense counsel is. Obviously from the  
2 government's position, you know, some of the documents, I  
3 think, are going to be in possession of the state's DA's  
4 office, which wouldn't be in our custody or control. I will  
10:57AM 5 make an expeditious request to have those documents produced to  
6 us. But the farther out the evidentiary hearing is, the more  
7 likely that, you know, we'll at least be able to get those  
8 documents or know well enough in advance what the DA's position  
9 is with respect to them.

10:57AM 10 MR. SCOTT: I'm concerned, Your Honor, and I hope  
11 I'm not talking out of both sides of my mouth, but I'm  
12 concerned about going forward with the evidentiary hearing  
13 before we have the documents that are going to be forthcoming  
14 for the trial, particularly if it's the government's position  
10:57AM 15 that the evidentiary hearing is going to dispel some of these  
16 concerns and is going to narrow the issues.

17 And frankly, I'm not sure how the government can feel  
18 confident saying that before they receive the files and before  
19 they know really the substance of what we're talking about  
10:57AM 20 here. But at the end of the day, I think if -- I'd be  
21 comfortable with -- or I'd prefer an evidentiary hearing date  
22 closer to the trial date, if it's at all possible, so that I  
23 could have as much material as is available before I cross him  
24 at the evidentiary hearing.

10:58AM 25 THE COURT: Okay. You want to set the evidentiary

1 hearing for the 23rd --

2 MR. SCOTT: Very good.

3 THE COURT: -- at 9:00 a.m.?

4 Evidentiary hearing January 23rd, 9:00 a.m.; trial,

10:58AM 5 January 30th, 9:00 a.m.

6 Isn't the first day of trial we do 9:00? Oh, 8:30 is the  
7 trial time. So January 30th, 8:30, start trial. The  
8 evidentiary hearing we'll do the 23rd at 9:00 a.m. Would it be  
9 a good idea for me to appoint counsel for the deputy, or does  
10:59AM 10 he have his current counsel?

11 MR. MARRETT: My understanding is that he doesn't  
12 currently have counsel.

13 THE COURT: He does not?

14 MR. MARRETT: He does not currently have counsel. I  
10:59AM 15 think he had counsel in the past, but my understanding is that  
16 he currently is not represented. So I believe, you know, an  
17 appointment with counsel sooner rather than later may be --  
18 would help to expedite at least his preparation.

19 THE COURT: All right. We'll appoint counsel.

10:59AM 20 Where is Mr. Govey now?

21 U.S. MARSHAL: He's in the back here. He  
22 communicated that he was very upset and he felt like he needed  
23 to get a little break, so to speak. So he conveyed to his  
24 lawyer to have us take him in the back briefly.

11:00AM 25 THE COURT: Just take him in the back.

1 MR. SCOTT: And I'm sorry for that, Your Honor. I'm  
2 certainly not encouraging people to walk out in the middle of  
3 court, but I figured it was the lesser of two evils to  
4 communicate his request to the marshals rather than have an  
11:00AM 5 outburst in court. I thought it would be less harmful than  
6 walking out.

7 THE COURT: Oh, you don't need to apologize at all.  
8 He's a pretty strong-willed man. He was going to leave  
9 regardless of what you said, at least that was from my  
11:00AM 10 observation. I couldn't hear what he was saying, but he was  
11 getting up to leave and he just left. But obviously I have a  
12 duty to maintain the integrity of the proceedings, and I just  
13 can't have counsel or parties, defendants just walking out when  
14 they want to leave. But I just don't know whether this is --  
11:01AM 15 it's necessary to have this conversation with him now. Maybe  
16 you should talk to him about it, and then I will have a  
17 conversation with him when we're back together on the 23rd.

18 MR. SCOTT: I think that's best. I think it's  
19 probably more productive to speak to him about that at the next  
11:01AM 20 date after a little time has passed.

21 MR. MARRETT: Your Honor, I want to note for the  
22 record, my understanding is that a lot of the panel attorneys  
23 may have been appointed either in state cases or other cases  
24 representing Orange County Sheriff's deputies. So there may be  
11:01AM 25 a conflict with the Orange County panel as far as appointment

1 purposes go.

2 THE COURT: Right. Okay. Well, it's going to be  
3 interesting. We'll see where we are. If there's any  
4 developments, please let me know sooner rather than later,  
11:02AM 5 okay.

6 And would you please follow up, Mr. Marrett, with a  
7 written order reflecting the excludable time and the new trial  
8 date and the date of the evidentiary hearing. And I guess  
9 we'll just have to see where we are there.

11:02AM 10 Mr. Scott, you've had trials with me before, so you know  
11 where we're going, but for planning purposes for the trial, I'm  
12 not inclined to sever. We didn't get there. I do think it  
13 would be unfair to the jurors to have to have two separate  
14 trials when it's the same witnesses, the same search, the same  
11:02AM 15 day in the same room. And I don't think the counterfeiting  
16 claim is legally or factually complex.

17 In light of what's happened today, I was going to say but  
18 if you feel you need a continuance to more gather your  
19 thoughts, I would certainly give you that continuance, but  
11:03AM 20 that's a little moot at this point given Mr. Govey doesn't even  
21 want a continuance for this.

22 MR. MARRETT: Thank you, Your Honor. And as far as  
23 jury instructions go, does the Court want to address those  
24 today, or does the Court want to do that at the evidentiary  
11:03AM 25 hearing?



1 THE COURT: I think you have a lot of work to do to  
2 get that stuff to him. I think we can schedule that for last  
3 minute the one -- there was a couple legal issues I had with  
4 the jury instruction and the verdict form. The jury  
11:03AM 5 instructions is possession is a lesser included crime than  
6 possession for distribution. And I didn't see the lesser  
7 included instruction plus the elements of possession, and I  
8 believe you need that.

9 Defense is going to have to make a decision on whether  
11:04AM 10 they want -- if any of the jurors feel that the greater is not  
11 proven or all the jurors have to determine that before they  
12 consider the lesser. If you look at the model instruction, it  
13 gives the defense the option of whether they want the jurors to  
14 address this if just one has a doubt or does all of them. But  
11:04AM 15 that's Mr. Scott's and Mr. Govey's call.

16 So I think you're going to have to have the lesser  
17 included instruction. I think it's 3.14 of the model  
18 instructions. And then you're going to have to set forth the  
19 elements for simple possession.

11:04AM 20 I'm not sure exactly the defense's theory of the case,  
21 Mr. Scott, but I know vindictive prosecution. But I'm assuming  
22 he's taking the position that they weren't his drugs. But if  
23 they were his drugs, they were for personal use. Or are you  
24 even going to make any of those alternative arguments something  
11:05AM 25 else?

1 MR. SCOTT: I think that -- frankly I don't think  
2 that the possession of the drugs themselves is going to be a  
3 big issue. I think the heart of the matter is whether they  
4 were possessed with intent to distribute.

11:05AM 5 THE COURT: All right. So we definitely need that  
6 lesser included. And then --

7 MR. MARRETT: And, Your Honor, just -- the  
8 government would prepare a proposed instruction. But I think  
9 largely whether that instruction is appropriate to give at the  
11:05AM 10 end of trial sort of depends on what the weight of the evidence  
11 is that comes in. It may be appropriate and we'll prepare that  
12 instruction, but at this time at least the government would  
13 object to giving it.

14 THE COURT: I'm not sure -- my understanding of the  
11:06AM 15 law is I would have to overrule that in a nanosecond is because  
16 a lesser included offense of possession for distribution is  
17 simple possession. And I have an obligation to instruct on the  
18 lesser. If all he does is ask a question that would suggest or  
19 takes the position that it was his own personal use, that's  
11:06AM 20 good enough now. It doesn't really matter -- he doesn't have  
21 to testify to get the lesser included instruction is I guess  
22 what I'm trying to say. He can just take the position that  
23 given the quantity of the narcotics, it wasn't for  
24 distribution, it was his own personal use. He's got a drug  
11:07AM 25 problem.

1 MR. MARRETT: And if that's -- obviously that's what  
2 we're sort of discussing is maybe the defense's case at trial.  
3 But until that presents itself, I don't think the government --  
4 if that is what the defense presents, then I think it would be  
11:07AM 5 appropriate. But --

6 THE COURT: Well, you know, I've been doing this now  
7 for state and federal almost 17 years, and every drug case  
8 where you have possession for sale, I always have the lesser  
9 included, including in federal court. So unless Mr. Scott's  
11:07AM 10 got some mysterious defense I've never heard and seen, it's  
11 always asserted. Unless you're dealing with kilos, then kilos  
12 you're going to have a hard time explaining to the jury that it  
13 was simple possession for personal use. But the quantities  
14 we're talking about here, you know, he certainly is within his  
11:07AM 15 rights and passes the smell test to say that this wasn't for  
16 distribution.

17 So for planning purposes, again, I want a lesser included  
18 instruction and then the elements of simple possession. The  
19 way I've done it in the past is it's all in the same  
11:08AM 20 instruction. The verdict forms got to reflect that on the  
21 lesser included and then track the language of the jury  
22 instruction.

23 Then on the quantity of the narcotics, I think you need  
24 another option for the jury. You have at least five grams or  
11:08AM 25 more, but you got to put in less than five grams. And I forgot

1 the -- in the comment section to the jury instruction on this,  
2 there is the category that you need to put there.

3 MR. MARRETT: I think that's right, Your Honor. I  
4 think the subsequent set that I sent to defense counsel that  
11:08AM 5 adds in the counterfeiting charges reflects that change in the  
6 proposed verdict form.

7 THE COURT: Okay. So I'm going to need a revised  
8 joint statement to reflect the two counts. I'm going to need  
9 revised jury instructions and a revised verdict form. And then  
11:09AM 10 we can go over the mechanics of the trial and jury selection  
11 either when we're here on the 23rd or we'll schedule a date  
12 soon thereafter but before obviously the 30th.

13 And I don't know if Mr. Tenley is going to be on the case,  
14 too, but he's had many trials with me and he knows the  
11:09AM 15 rigamarole. I'm sure he can tell you what needs to be done.

16 MR. MARRETT: I will consult with him.

17 THE COURT: Mr. Scott, you've had many trials with  
18 me, so you know.

19 MR. SCOTT: One of them will go smoothly one day,  
11:09AM 20 Your Honor.

21 THE COURT: I'm not going to have to set up another  
22 camera, am I?

23 MR. SCOTT: At some point you wonder what the common  
24 denominator is. I have to question myself.

11:10AM 25 THE COURT: Is it you or me?

1 MR. SCOTT: Well, it's one of us.

2 THE COURT: Okay. All right. Anything further we  
3 should discuss today?

4 MR. SCOTT: No, thank you, Your Honor.

11:10AM 5 MR. MARRETT: I don't think so. Thank you.

6 THE COURT: Thank you.

7 THE COURTROOM DEPUTY: All rise.

8 **(Proceedings concluded at 11:10 a.m.)**

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